No. 11,381

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HYMAN STILLMAN and LOU SEGAL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON APPEAL.

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This is an appeal from judgments of conviction of Hyman Stillman and Lou Segal, on Counts 1, 2, 3, 4, 5, 6, 12, 13, 32, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49 and 50 of an indictment charging *felony* conspiracy in Count 1, in violation of Title 18, Section 88, U. S. Code, and *misdemeanor* convictions in the other counts, in violation of Title 50, App. 901 *et seq.*, in violation of the Emergency Price Control Act of 1942 (not "as amended").

The defendants were indicted on March 11, 1946 [R. 2], and found guilty on July 2, 1946. [R. 47, 48.] Judgments were pronounced against them as to Count 1 of a fine of $3000.00 and one year imprisonment [R. 55], and $750.00 and six months imprisonment (jail sentence) on each of the succeeding counts, to run concurrently, or a total of $19,500.00 as to each defendant on each of the counts in the indictment.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 225, U. S. Code, and by the Emergency Price Control Act of 1942, Title 50 App., Section 925.

Statutes and Regulations Involved.

The Emergency Price Control Act of 1942, Title 50 App., Section 901 *et seq.* and Maximum Price Regulations 148, 165, 169 and 239.

THE SPECIFICATION OF ERRORS.

Questions Presented by This Appeal.

I.

The indictment fails to state an offense against the laws of the United States. The Court erred in overruling the motions to dismiss and the motion in arrest of judgment.

The indictment was void because it charged a felony conspiracy and a misdemeanor conspiracy in the same indictment. They were inconsistent with each other. This nullifies the indictment.

The indictment was void because it alleges on its face that it was not brought by a legally constituted and then existing grand jury.

The verdicts were contrary to the law and the evidence.

II.

The indictment erroneously charges a felony conspiracy based upon a statute which permits only misdemeanor prosecutions. The joining of the felony and misdemeanor prosecutions in the same indictment was prejudicial error, and in violation of the congressional mandate.

III.

The District Court erred in the admission and exclusion of evidence in the case. It was prejudicial error to admit the defendants' income tax statements.

IV.

Title 26, Section 55, U S. Codes, inherently and as construed and applied in this case as well as the regulations issued pursuant thereto are unconstitutional and in violation of defendants' rights under the Fourth and Fifth Amendments to the United States Constitution.

V.

The Court erred in admitting into evidence the income tax statements of the defendants without proper authorization as required by law.

VI.

The Court erred in the admission of statements taken by law as confidential and which statement constituted compelled testimony, the use of which is forbidden by the Fifth Amendment to the Constitution of the United States.

VII.

The Court erred in overruling the motion to dismiss on the grounds that the indictment was indefinite, uncertain and violated the Sixth Amendment to the Constitution of the United States in that it failed to set forth facts which apprised the accused of the nature and cause of the offense.

VIII.

The Court erred in denying a Bill of Particulars.

IX.

The Court erred in holding that there was jurisdiction to pronounce judgment on the statute which had expired and no regulations which had also ended.

X.

The Court erred in restricting cross-examination of certain witnesses.

XI.

The Court erred in admitting certain invoices in evidence.

XII.

The Court erred in certain instructions given.

XIII.

The Court erred in declining to sustain motions in arrest of judgment.

I.

The Indictment Was Void Because It Charged a Felony Conspiracy and a Misdemeanor Conspiracy in the Same Indictment. They Were Inconsistent With Each Other. This Nullifies the Indictment.

Count 1 of the indictment charges the defendants with a felony conspiracy. It sets forth as part of the felony conspiracy the overt acts, most of the acts charged in the subsequent counts, which charged a conspiracy of a misdemeanor nature.

This is the situation which was condemned in *Pinkerton v. United States,* 328 U. S. 640, wherein the Court said, 90 L. Ed. 1494, 328 U. S. 643:

> "There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime."

This is the identical situation which was contained in *Goldsmith v. United States* and *Blumenthal v. United States, Weiss v. United States, Feigenbaum v. United States,* now pending before the Supreme Court of the United States on certiorari, in cases Nos. 1162, 1163, 1164, 1165, and set for argument in the October term of the Court. We think that the indictment could not be drawn to charge both felony conspiracy and misdemeanor conspiracy, which would affect the charging of a conspiracy to conspire, and that this situation necessarily requires a reversal of the judgment.

Such a similar construction has been placed upon the law in *United States v. Kissel,* 174 Fed. 823, 825; *United States v. Patterson,* 201 Fed. 697, 723. In the Sherman Anti-Trust Act Cases: In *United States v. Kissel,* 173 Fed. 823, 825, the Court said:

> "This indictment is necessarily brought under the provisions of the Sherman Act * * * nor could this indictment be brought under Sec. 5440 of the U. S. revised statutes because there is no law of the U. S. making a conspiracy in restraint of trade or to monopolize trade, an offense against the U. S. except the Sherman Act and it cannot be a conspiracy to engage in a conspiracy."

Section 205B of the Emergency Price Control Act denounces as a misdemeanor any violation of Section 4 of the Emergency Price Control Act, which makes it an offense as follows:

> "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into for any person to sell or deliver any commodity . . . in violation of any . . . price schedule effective in accordance with provision of Section 206 . . . or to offer, solicit, *or to agree to do any of the foregoing.*"

Thus the Emergency Price Control Act denounces as a substantive offense a conspiracy to violate a regulation of an administrator regarding a price. The words "agreement" and "conspiracy" in criminal law are synonymous—to conspire is to agree. *Morrison v. California,* 291 U. S. 82; *Marcenty v. United States,* 49 F. (2d) 156; *Wright v. United States,* 108 Fed. 805; *United States v. Sager,*

49 F. (2d) 725; *Morris v. United States,* 34 F. (2d) 839; *United States v. Katz,* 271 U. S. 354, 7 L. Ed. 986; *Gibardi v. United States,* 287 U. S. 119, 77 L. Ed. 209. The Emergency Price Control Act presents a declared intention of Congress to make conspiracies to violate the Emergency Price Control Act a misdemeanor. It was clearly Congressional intent to withdraw such offenses from the classification of felony.

II.

The Indictment Was Void on Its Face.

The indictment was returned March 11, 1946. [R. 2.] The indictment alleges:

> "Grand Jurors of the United States of America, being duly impaneled, sworn and charged in the District Court for the Southern District of California, Central Division, in the September, 1945, Term of this Court, having begun but not finished during the said September Term of Court, among other things, the matter of the investigations charged in this indictment, and having continued to set by the order of this Court in and for the said District during the February, 1945 Term to complete inquiries begun, but not finished, at the original term, and inquiring for that District, upon their oaths find and present as follows:"

The indictment was presented on oath of the grand jury as a true and correct copy of the indictment and was signed,

> "A true bill. John D. Boyle, Foreman." [R. 126.]

It was filed March 11, 1946. This was long after the term of court in February, 1945 and the power and authority of the grand jury under its own oath had expired. The indictment was therefore void. Objection was made to the indictment on account of the fact that it was brought after the term of court in which it was lawfully constituted. [R. 86.] The Court overruled the objections and allowed an exception to the defendants. [R. 87.] As stated in *United States v. McKay:*

> "A United States District Court is a court of limited jurisdiction with only such powers as are specially conferred by statute.
>
> "The grand jury sitting in a United States District Court is strictly a creature of statute, and there is no such thing as a *de facto* grand jury in the federal court.
>
> "The original life of grand jury and its authority to act and any continued existence which it may have after expiration of term for which it was impaneled depends strictly on statutory authority, and unless that authority is complied with there is no jurisdiction to return an indictment.
>
> "Here we must take the indictment on its face under the solemnity with which it was returned and the indictment shows on its face that there was no authority to return it at the time mentioned, and it shows on its face that it purports to be returned by the grand jury either sitting in the 1945 term when it was without jurisdiction to sit, or beyond that term when there is no jurisdiction alleged in the indictment."

The indictment, therefore, is void on its face and all proceedings subsequently had are void. An indictment must be accepted as a true document. It cannot be altered either on its face or by any other means which would have the effect of altering its contents.

United States v. Carney, et al., No. 11001, Ninth Circuit Court of Appeals.

III.

The Court Erred in Refusing to Dismiss the Indictment on the Ground that:

1. It failed to state an offense against the laws of the United States, and

2. It consisted of a series of conclusions of the pleader and failed to descend to particulars as required by the sixth amendment to the Constitution of the United States. [R. 26, 27.] There was a demand made for a bill of particulars [R. 28 *et seq.*] upon which we will touch a little later.

The indictment charged in very general terms conclusions of the pleader that prices would be charged "in excess of the maximum price permitted under the Emergency Price Control Act of 1942, and applicable regulations promulgated thereunder, including Maximum Price Regulation No. 165." [R. 4.] Paragraph b charged that defendants would refuse and cause others to refuse to render slaughtering services to any prospective purchasers of such services unless prices were paid therefor which were in excess of the maximum prices permitted under the aforesaid Emergency Price Control Act of 1942, and of the aforesaid Maximum Price Regulation No. 165. [R. 4.] Each of the paragraphs in the con-

spiracy count of the indictment charged such general terms. The substantive counts allege that the defendants charged in excess of the maximum prices pursuant to a regulation therein specified, but did not specify the price charged. Throughout the indictment these same general conclusions of the pleader were mentioned without descending to particulars. Demand for Bill of Particulars demanded particulars as to the regulation in particular charged with being violated and a demand for a specification of the price alleged to have been charged and the date of the charge and the person to whom the charge was made. [R. 28.] The name of any prospective purchaser to whom any of the defendants refused slaughtering services and the alleged price or prices which it was claimed were requested for such services. The demand for a bill of particulars specified the number of the regulation particularly with which the indictment was lacking in its allegation. This was also refused. [R. 32.]

The Sixth Amendment to the Constitution of the United States requires that an indictment descend to particulars as to the nature and cause of the accusation.

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588;

United States v. Hess, 124 U. S. 483, 31 L. Ed. 516;

Foster v. United States, 253 Fed. 481;

Miller v. United States, 288 Fed. 817;

Sixth Amendment to the Constitution of the United States.

"A defendant is entitled to particulars as to times, places, persons present and other data necessary to make his defense."

Rules of Criminal Procedure (new), Rule 7, subdivision (f);

Glasser v. United States, 315 U. S. 60, 86 L. Ed. 680.

Without these particulars the defendant was deprived of his constitutional right to know the nature and cause of the accusation and to have the exact facts which he was called upon to meet at the trial.

(c) The motion to dismiss should have been granted for another reason. Cattle and meat are an agricultural product and any price regulation which affected it had to be approved first by the Secretary of Agriculture.

The failure of the indictment to specify that the regulations herein involved, to-wit: 148, 165, 169 and 239 of Maximum Price Regulations, failed to specify an offense against the United States, since before such regulations could be violated as affecting the defendants, they had to be approved by the Secretary of Agriculture, and the indictment had to so state if it involved a fine after 1945 and could be legally considered as having done so.

Emergency Price Control Act of 1942.

(d) The motion to dismiss should also have been granted for the reasons that the indictment only specifies a violation of the Emergency Price Control Act of 1942 and regulations thereunder. The Emergency Price Control Act of 1942 expired in 1943. It was only the amendments thereunder that could possibly apply. The indictment does not specify the Emergency Price Control Act of 1942 *as amended,* but only the Emergency Price Con-

trol Act of 1942, which had long expired and there were no applicable regulations under the Emergency Price Control Act of 1942 expiring in 1943, which affected these defendants as to acts occurring in 1944 and 1945 and for which no indictment had been returned until March 11, 1946. [R. 2.]

United States v. Chambers, 291 U. S. 217;
United States v. Hark, 320 U. S. 531, 88 L. Ed. 290.

III.

The Indictment, Furthermore, Did Not Charge An Offense.

The indictment and each count charged violation of the Emergency Price Control Act of 1942. That Act expired in 1943 and prior thereto Maximum Price Regulations 148, 165, 169 and 239 were promulgated. Each of the counts bears the same fatality.

No allegation is made in the indictment that it relates to the Emergency Price Control Act of 1942, "as amended." Therefore the statute's power and regulations under it expired.

U. S. v. Chambers, 291 U. S. 217;
U. S. v. Hark, 320 U. S. 531, 88 L. Ed. 290.

The court erroneously instructed the jury as to what the Emergency Price Control Act of 1942 "as amended" provided; but the indictment only alleged the Emergency Price Control Act of 1942. It was not within the power of the court to amend the indictment either by adding anything to it directly or by way of an instruction.

Ex Parte Bain, 120 U. S. 1;
Edgerton v. United States, 143 F. (2d) 697;
United States v. Carney, decided Aug. 22, 1947, No. 11001, Ninth Circuit Court of Appeals.

IV.

The Court Erred in the Admission of Income Tax Returns, Without the Specific Approval of the Secretary of the Treasury or An Order of the President.

Title 26, Section 55, U. S. Codes and Treasury Regulations TD4945, §463D4, §463D5, TD4929, §463C34, §463C36, §463C37, §463C35, §45831, 45833, 45834, 45836, 45838, 45839, §45890, and 458.64, inherently and as construed and applied in this case are unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States in that although the statements are compelled through the authority of law the statute does not grant immunity for use of these compelled statements as broad as the provisions of the Fifth Amendment to the Constitution of the United States.

Counselman v. Hitchcock, 142 U. S. .....

Income Tax Returns—Inspection—Obtaining Copies —and Use of Returns in Litigation.

Title 26, Internal Revenue Code (same as U. S. C.), Section 55, contains the authority for rules and regulations concerning inspection of income tax returns, etc. It provides in part as follows:

> "Section 55. PUBLICITY OF RETURNS.
>
> (a) Public record and inspection.
>
> (1) Returns made under this chapter upon which the tax has been determined by the Commissioner shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President, and under rules and regulations prescribed by the Secretary and approved by the President.

(2) And all returns made under this chapter, subchapters A, B and D of chapter 2, subchapter B of chapter 3, chapters 4, 7, 12 and 21, subchapter A of chapter 29, and subchapters A and B of chapter 30, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

(3) Whenever a return is open to the inspection of any person a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Commissioner with the approval of the Secretary. The Commissioner may prescribe a reasonable fee for furnishing such copy."

The following sections of Treasury Decisions 4945 and 4929, promulgated pursuant to the authority contained in Section 55 of the Internal Revenue Code, set up the procedure to be followed to inspect or obtain copies of income tax returns:

"T. D. 4945, Section 463D.4 (CCH. Par. 517). USE OF RETURNS IN LITIGATION.—The return of an individual, partnership, corporation, or fiduciary, or a copy thereof, may be furnished to a United States attorney for official use in proceedings before a United States grand jury or in litigation in any court, if the United States is interested in the result, or for use in preparation for such proceedings or litigation; or to an attorney of the Department of Justice, for like use, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General. If a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent the publicity neces-

sarily results from such use. The original return will be furnished only in exceptional cases, and then only if it is made to appear that the ends of justice may otherwise be defeated. Neither the original nor a copy of a return desired for use in litigation in court will be furnished if the United States Government is not interested in the result, but this provision is not a limitation on the use of copies of returns by the persons entitled thereto.

T. D. 4945, Section 463D.5 (CCH. Par. 518). Furnishing of Copies of Returns.—A copy of a return may be furnished to any person who is entitled to inspect such return upon written application therefor and the submission of evidence satisfactory to the Commissioner of his right to receive the same, except that if a return is in the custody of a collector or of an internal revenue agent in charge or the head of a field division of the Technical Staff, such collector or agent in charge may furnish a copy of such return to a United States Attorney or an attorney of the Department of Justice, or to the taxpayer or his duly authorized attorney in fact, in accordance with these regulations. Certified copies will be furnished only upon specific request therefor sent to the Commissioner at Washington.

T. D. 4929, Section 463C.34 (CCH. Par. 505). Inspection by Government Attorneys.—Any return shall be open to *inspection* by a United States Attorney or by an attorney of the Department of Justice where necessary in the performance of his official duties. The request for *inspection* shall be in writing and, except as provided in section 463C.37, shall be addressed to the Commissioner, and shall state the purpose for which inspection is desired. It may be signed by the Attorney General, the Assistant

to the Attorney General, and Assistant Attorney General, or a United States Attorney.

T. D. 4929, Section 463C.36 (CCH. Par. 507). PLACE OF INSPECTION.—Generally, returns may be inspected only in the Bureau of Internal Revenue, Washington, D. C., unless such returns are in the custody of a collector of internal revenue or internal revenue agent in charge of the head of a field division of the Technical Staff, in which event the returns may be inspected in the office of such collector or agent in charge or head of division, but only in the presence of an internal revenue officer, designated by the Collector or agent or head of division for that purpose.

T. D. 4929, Section 463C.37 (CCH. Par. 508). APPLICATIONS FOR INSPECTION.—Except as provided in section 463C.33, and as hereinafter provided, all applications for permission to inspect returns must be made in writing to the Commissioner of Internal Revenue. When a return is in the custody of a collector of internal revenue or internal revenue agent in charge of the head of a field division or the Technical Staff, such collector or revenue agent in charge or head of division, upon written application to him, is authorized to permit the inspection of such return by a United States Attorney, or an attorney in the Department of Justice, or by the taxpayer or his duly authorized attorney in fact, in accordance with these regulations.

T. D. 4929, Section 463C.35 (CCH. Par. 506). INFORMATION RETURNS.—Information returns, schedules, lists and other statements designed to be supplemental to, or to become a part of, the returns shall be subject to the same rules and regulations as to inspection as are the returns themselves. In any case where inspection of the return is authorized by these

regulations, the Commissioner may, in his discretion, permit inspection of other records and reports which contain information included or required by statute to be included in the return."

Title 26—Internal Revenue, Chapter I, Code of Federal Regulations of the United States, states as follows:

"458.31 *Permission to inspect.* The Commissioner of Internal Revenue, upon written application setting forth fully the reasons for the request, may grant permission for the inspection of returns in accordance with the regulations in subpart.*" [Part. III, art. 1.]

"458.32 *Treasury Department officials and employees.* The officers and employees of the Treasury Department whose official duties require inspection of returns may inspect any such returns without making such written application. If the head of a bureau or office in the Treasury Department, not a part of the Internal Revenue Bureau, desires to inspect, or to have an employee in his bureau or office inspect a return, in connection with some matter officially before him, for reasons other than tax administration purposes, the inspection may, in the discretion of the Secretary, be permitted upon written application to him by the head of such bureau or office, showing in detail why the inspection is desired." [Part III, art. 2.]

"458.33 *Inspection by branch of Government other than Treasury Department.* Except as provided in sec. 458.34, if the head of an executive department (other than the Treasury Department), or of any other establishment of the United States Government, desires to inspect or to have some other of-

ficer or employee of his branch of the service inspect a return in connection with some matter officially before him, the inspection may, in the discretion of the *Secretary of the Treasury*, be permitted upon written application to him by the head of such executive department or other Government establishment. The application shall be signed by such head and shall show in detail why the inspection is desired, the name and address of the taxpayer who made the return, and the name and official designation of the person it is desired shall inspect the return*" [Part III, art. 3.]

"458.34 *Inspection by Government attorneys.* Any return shall be *open to inspection* by a United States attorney or by an attorney of the Department of Justice where necessary in the performance of his official duties. The request for inspection shall be in writing and, except as provided in sec. 458.37, shall be addressed to the Commissioner, and shall state the purpose for which inspection is desired. It may be signed by the Attorney General, the Assistant to the Attorney General, an Assistant Attorney General, or a United States attorney.*" [Part III, art. 4.]

"458.35 *Information returns.* Information returns, schedules, lists, and other statements designed to be supplemental to, or to become a part of, the returns shall be subject to the same rules and regulations as to inspection as are the returns themselves. In any case where inspection of the return is authorized by the regulations in this subpart the Commissioner may, in his discretion, permit inspection of other records and reports which contain information included or required by statute to be included in the return.*" [Part III, art. 5.]

"458.36 *Place of inspection.* Generally, returns may be inspected only in the Bureau of Internal Revenue, Washington, D. C., unless such returns are in the custody of a collector of internal revenue or internal revenue agent in charge, in which event the returns may be inspected in the office of such collector or agent in charge, but only in the presence of an internal revenue officer, designated by the collector or agent for that purpose.*" [Part III, art. 6.]

"458.37 *Applications for inspection.* Except as provided in sec. 458.33, and as hereinafter provided, all applications for permission to inspect returns must be made in writing to the Commissioner of Internal Revenue. When a return is in the custody of a collector of internal revenue or internal revenue agent in charge, such collector or revenue agent in charge, upon written application to him, is authorized to permit the inspection of such return by a United States attorney, or an attorney in the Department of Justice, or by the taxpayer or his duly authorized attorney in fact, in accordance with the regulations in this subpart.*" [Part III, art. 7.]

"458.38 *Penalties.* Section 3167, Revised Statutes, as amended by the Revenue Act of 1918, and reenacted without change by section 1115 of the Revenue Act of 1926 (44 Stat. 117; 26 U. S. C. 1828), makes it a misdemeanor, punishable by fine not exceeding $1,000, or by imprisonment not exceeding one year, or both, at the discretion of the court, for any person to print or publish in any manner whatever not provided by law information contained in any income return, and further provides that if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment. The penalties provided in sec-

tion 3167, Revised Statutes, are applicable also to disclosure of information contained in excess-profits and capital stock tax returns and returns made under title IX of the Social Security Act.*" [Part III, art. 8.]

"458.39 *Former regulations revoked.* Former regulations issued with the approval of the President in respect of inspection of returns, except regulations relating to the inspection of returns by committees of Congress, regulations relating to overassessments contained in Treasury Decision 4583 [C. B. XIV-2, 318 (1935)], and regulations governing the inspection of income tax returns, Form 1042B, by the Department of National Revenue, Ottawa, Canada, are hereby revoked to the extent that they are inconsistent with secs. 458.0-458.39.*" [Part III, art. 9.]

"458.64. *Penalties for disclosure of returns.* Section 3167, Revised Statutes, as amended by the Revenue Act of 1918 and reenacted without change by section 1115 of the Revenue Act of 1926, makes it a misdemeanor punishable by a fine not exceeding $1,000 or by imprisonment not exceeding 1 year, or both, at the discretion of the court, for any person to print or publish in any manner whatever not provided by law information contained in any income return, and further provides that if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment. The penalties provided in section 3167, Revised Statutes, are applicable also to disclosure of information contained in excess-profits and capital

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*For statutory and source citations, see note to sec. 458.0.

stock tax returns and returns made under title IX of the Social Security Act."* [Part I, art. 4.]

"458.90. *Use of returns in litigation.* The return of an individual, partnership, corporation, or fiduciary, or a copy thereof, may be furnished to a United States attorney for official use in proceedings before a United States grand jury or in litigation in any court, where the United States is interested in the results, or for use in preparation for such proceedings or litigation; or to an attorney of the Department of Justice, for like use, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General. When a return or copy is thus furnished, it must be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent that publicity necessarily results from such use. The original return will be furnished only in exceptional cases, and then only when it is made to appear that the ends of justice may otherwise be defeated. Neither the original nor a copy of a return desired for use in litigation in court will be furnished where the United States Government is not interested in the result, but this provision is not a limitation on the use of copies of returns by the persons entitled thereto."* [Part IV, art. 1.]

Each of the above statutes and regulations are challenged inherently and as construed and applied in this case.

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*For statutory and source citations, see note to sec. 458.60.

Title 26, Section 55, U. S. Codes, Inherently and as Construed and Applied in This Case and the Regulations Issued Pursuant Thereto Are Unconstitutional in That They Violate the Defendants' Rights Under the Fourth and Fifth Amendments to the Constitution of the United States.

(a) Members of the Bureau of Internal Revenue were not authorized to disclose the information which they had obtained in the course of their official duties, which under the statute was unconstitutional.

(b) Statements taken by members of the Bureau of Internal Revenue pursuant to the authority vested in them by statute to compel such statements must either be limited to the use for which they are given or their compulsion violates the Fifth Amendment to the Constitution of the United States.

During the course of the trial, the court called Donald Oliver Bircher, a special agent of the Bureau of Internal Revenue, to testify not only regarding income tax statements taken from the defendants but a statement taken from Lou Segal.

The following challenge was made at the time:

> "Mr. Lavine: I want to make an objection and I think I can make it more specifically if I have that statute before me. [204]
>
> The Court: You might state what your objection is in the meantime and, if you wish to amplify it later, you may do so.
>
> Mr. Lavine: I have the objection in mind but I could make it more specifically if I had the book before me.
>
> The Court: Make it and then you may amplify it later.

Mr. Lavine: Very well. We object at this time on the ground that the document which counsel has not exhibited does not contain specific authority, first of all, for counsel to secure from this witness matters that have occurred in connection with the Bureau of Internal Revenue's investigation, and that there is no specific authority to use that information in this specific trial. That is the first objection. The second objection which I wish to present to your Honor is that Title 26, Section 55, which provides that the records of the Bureau of Internal Revenue are public records but with certain limitations therein specified, as attempted now to be construed and applied in this case by the government, is unconstitutional and is in violation of the defendant's rights under the fourth and fifth Amendments to the Constitution of the United States, in this respect. Your Honor will bear in mind that in connection with the duties of a citizen and taxpayer he has the duty to present to the Bureau of Internal Revenue all facts relating to his tax situation and those duties are mandatory. They are compelled by statute. [205] They being compelled by statute to be performed and the defendant having performed them in respect to these matters, or the accused having performed them in respect to these matters, his testimony before the Internal Revenue Department or his statements before that bureau would then and thereafter be compelled testimony within the meaning of the language of Feldeman v. The United States. Your Honor probably recalls the Feldeman case, in which case there was compelled testimony. That is contained in 322 U. S. at page 487. That was a case where testimony was compelled before a State agency, it was admissible in the Federal Court but the language is implicit in that case that, if it had been before a federal agency, that testi-

mony would then be inadmissible in any federal court. And, so far, then, as the government now seeks to have this statute construed to permit the use in evidence in a criminal trial of matters that are compelled by statute to be performed in connection with the Bureau of Internal Revenue, that statute is challenged inherently and as construed and applied in this case as violative of the fifth amendment to the Constitution of the United States.

In respect to my argument, your Honor, the court in the Feldeman case points out that the Constitution prohibits an invasion of privacy in proceedings over which the government [206] has control and it would be implicit in the decision in that case that, had the testimony there been compelled in a federal proceeding, it would have been inadmissible and would have violated both the fourth and fifth Amendments to the Constitution of the United States. And for those reasons I now challenge the proceedings about to be had by the government, on those grounds.

The Court: There are some exceptions, are there not, Mr. Lavine, in the statute?

Mr. Lavine: Yes; there are exceptions contained in the statute and the statute contains permission for the Collector of Internal Revenue to grant permission to the government, but it would seem, as I read that statute, that that permission must be construed in the light of all of its associated paragraphs and chapters and that, construed in that light, it would give that permission in the case of an investigation of an Internal Revenue violation. I do not think that Congress ever intended to extend the scope of that statute to permit the use of information secured by the Bureau of Internal Revenue, presumably confidential in its nature and for the purpose of having the tax-

payer give to the government all that is due to the government, in some other proceeding which is not related to tax matters. Your Honor could very well see that such a construction would probably defeat the very purpose which the broad scope of the Internal Revenue statute [207] has of encouraging in every respect the fullest payment of all taxes due, in every respect, to the government. And for that reason, as the statute is now attempted to be construed and applied in broadening its scope or sphere of application, it is challenged as violative of the fourth and fifth Amendments of the Constitution. Of course, if your Honor holds with me that the statute doesn't have the scope which the government seeks to have placed upon it by the evidence which they are now about to offer, then it gives a constitutional construction to the statute and gives one which I think is within the clear intent of Congress."

An examination of Section 55, Title 26, provides that returns shall constitute public records but "except as hereinafter provided in this section," they shall be open to inspection only upon order of the president and under rules and regulations prescribed by the secretary and approved by the president.

Hence, two things are necessary before the returns can be made public: (1) There must be an order of the president, and (2) they must comply with rules and regulations prescribed by the secretary and approved by the president.

It is not sufficient, merely to have an order of the Commissioner of Internal Revenue. The government in this case has read statutes to provide in the alternative: (1) Letter of the president "or" (2) rules and regulations

prescribed by the secretary and approved by the president. The statute does not so state. It says "and" instead of "or" and therefore requires both before any record can be used.

There was a demonstration of this during a recent congressional investigation of former Congressman May wherein a specific request of the president was sought. If only a secretary's authority was needed, no request would have been made of the president in this case.

Furthermore, inspection by committees of Congress may not be furnished the information "sitting in executive session." In other words, not even Congress can make it public at a public hearing. Therefore, certainly there was no intent on the part of Congress to make a taxpayer's return or any statement he made to the Internal Revenue Department public in court, if not even Congress can use it in any other manner than in an executive session.

(c) Since under Section 54, Title 26, the taxpayer is compelled by statute to make such return and statements, the statement has the effect of being compulsory and therefore cannot be used against an accused in any criminal trial, unless the statute of compulsion which it requires. Any other provision or construction would be in violation of the Fifth Amendment to the Constitution of the United States.

See

Counselman v. Hitchcock, 142 U. S. 547, 35 L. Ed. 1110;

Brown v. Walker, 161 U. S. 591, 40 L. Ed. 819;

Monia v. U. S., 317 U. S. 424.

The regulations provide that the United States Attorney is limited to the use in any event for which the inspection was permitted: "When a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished."

This means that the request must be specific and must specifically designate what use is to be made of it and not permit it to be an omnibus catch-all general use.

There was a failure to comply with such specific requirements, even if the sections and regulations be construed as constitutional.

Title 26, Section 55, U. S. Codes and Treasury Regulations TD 4945, §463D4, §463D5; TD 4929, §463C34, 463C36, 463C37, 463C35, §45831, 45833, 45834, 45838, 45839, 45890 and 458.64, inherently and as construed and applied in this case are unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States, in that although the statements are compelled through the authority of law the statute does not grant immunity for use of these compelled statements as broad as the provisions of the Fifth Amendment to the Constitution of the United States.

Title 26, Section 54, U. S. Codes, provides as follows:

> "§54. Records and special returns—(a) By taxpayer.
>
> Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.
>
> (b) To determine liability to tax.

Whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return, render under oath such statements, or keep such records, as the Commissioner deems sufficient to show whether or not such person is liable to tax under this chapter.

(c) Information at the source.

For requirement of statements and returns by one person to assist in determining the tax liability of another person, see sections 147 to 150.

(d) Copies of returns.

If any person, required by law or regulations made pursuant to law to file a copy of any income return for any taxable year, fails to file such copy at the time required, there shall be due and assessed against such person $5 in the case of an individual return or $10 in the case of a fiduciary, partnership, or corporation return, and the collector with whom the return is filed shall prepare such copy. Such amount shall be collected and paid, without interest, in the same manner as the amount of tax due in excess of that shown by the taxpayer upon a return in the case of a mathematical error appearing on the face of the return. Copies of returns filed or prepared pursuant to this subsection shall remain on file for a period of not less than two years from the date they are required to be filed, and may be destroyed at any time thereafter under the direction of the Commissioner.

(e) Foreign personal holding companies.

For information returns by officers, directors, and large shareholders, with respect to foreign personal holding companies, see sections 338, 339 and 340.

For information returns by attorneys, accountants, and so forth, as to formation, and so forth, of foreign corporations, see section 3604."

In *Counselman v. Hitchcock,* 142 U. S. 547-586, 35 L. Ed. 1114, the court said:

"It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties, or forfeitures. Rex v. Slaney, 5 Car. & P. 213; Cates v. Hardacre, 3 Taut. 424; Maloney v. Bartley, 3 Campb. 210; 1 Stark Ev. 71, 191; Sir John Friend's Case, 13 How. St. Tr. 16; Earl of Macclesfield's Case, 16 How. St. Tr. 767; 1 Greenl. Ev. §451; 1 Burr's Trial, 244; Whart. Crim. Ev. (9th ed.) §463; Southard v. Rexford, 6 Cow. 255; People v. Mather, 4 Wend. 229; Lister v. Boker, 6 Blackf. 439."

And it is further said:

"It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect. It is to be noted of §860 of the Revised Statutes that it does not undertake to compel self-criminating evidence from a party or a witness. In several of the state statutes above referred to, the testimony of the party or witness is made compulsory, and in some either all possibility of a future prosecution of the party or witness is distinctly taken away, or he can plead in bar or abatement the fact that he was compelled to testify.

> We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitution prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

There is no doubt the statute compels disclosure. It does not grant immunity as broad as the disclosure which is compelled.

Counselman v. Hitchcock, 142 U. S. 547-586;
Monia v. U. S., 317 U. S. 424.

As construed and applied in this case, also, the Statute and applicable sections offend the Fifth Amendment. There is, of course, no difference between a regulation issued pursuant to purported statutory authority and what it does than there is to the statute. The executive does not have as great a power as Congress. The only power he has is such as Congress gives him. Therefore, if the original source failed to comply with constitutional mandate, everything that follows it must necessarily be unconstitutional.

The statute regarding inspections, furthermore, does not authorize use in litigation. It is only a regulation presumed to have been issued pursuant to congressional

authority that attempts to give such additional rights or benefits to the United States of America. Such authority is not warranted by an examination of the statutes, its purposes or its history.

The court therefore erred in admitting the returns of the taxpayers to which they objected and the use of such compelled information violated the defendants' rights under the Fifth Amendment to the Constitution of the United States.

The court erred in refusing defendants' instructions on the free and voluntary character of the statements.

The defendants objected to the statements as not being free and voluntary and as a violation of their Constitutional Rights under the Fifth Amendment to the Constitution of the United States.

These proposed instructions were submitted to the court as a request to charge the jury to determine whether the statements were free and voluntary:

"Defendants' Proposed Instruction No. 26

"You are instructed that if you find that any statements which any of the agents of the Internal Revenue Department testified defendants made were made or given by such defendant under compulsion or fear of prosecution, then you must disregard such statements in determining the innocence or guilt of such defendant or defendants.

Defendants' Proposed Instruction No. 28

You are instructed that the Government in this case has produced the testimony of agents of the Internal Revenue Department to testify against the accused. Before this testimony can be received in

evidence, it must be shown that the statements made were made freely and voluntarily and without the slightest pressure of fear or hope of immunity or reward of any kind or character, or of any benefits to be gained by making the statement.

The mere fact that the statement as made is labeled voluntary does not make it so. You must consider the exact situation in which the accused found himself at the time of making the statement and determine from all of the facts and circumstances as they appear to you, under these instructions, whether the statements as made were freely and voluntarily made.

An accused may be under the greatest of fear or have the highest hopes of reward, and yet say that he is making his statement voluntarily, when in truth and in fact, the statement was not so made in the eyes of the law. If, from the evidence in this case, you determine that any statement made by any accused to the agents of the Internal Revenue Department were not made freely and voluntarily, but were made with a hope of reward or promise of immunity, or to benefit the accused by making the statement, such pressure will require you to disregard the statement so made, as though it had never been made.

Lisenba v. California, 315 U. S. 826, 86 L. Ed. 1222;

Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 716;

People v. Dye, 119 Cal. App. 262." [R. 67-88.]

The instructions were refused.

Where there is an issue as to whether a statement which is given is free and voluntary, the mere fact that it is

labelled free and voluntary does not make it so, and an accused is entitled to have the issue submitted to the jury.

Lisenba v. California, 314 U. S. 219, 86 L. Ed. 166;

Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 716;

People v. Dye, 119 Cal. App. 262;

Bram v. United States, 168 U. S. 532, 42 L. Ed. 568;

Gros v. United States, 136 F. (2d) 878.

The court therefore erred in admitting the income tax statements of the defendant and also the statement of Lou Segal taken from Donald Oliver Bircher.

The Evidence Was Insufficient to Justify the Verdict as to Each Count. The Following Argument Proceeds Without Using Our Contention That the Indictment Fails to State an Offense.

Count I of the indictment charges the defendants with felony conspiracy. It is alleged that the Southern California Meat Company, Charles M. King, Hyman Stillman and Lou Segal conspired, etc. [R. 3], to violate the "Emergency Price Control Act" (not as amended). The gist of the offense of conspiracy is the unlawful agreement and an overt act in furtherance of it.

Pettibone v. U. S., 148 U. S. 197, 37 L. Ed. 419;

Weniger v. U. S., C. C. A. 9, 47 F. (2d) 692.

Proof of unlawful agreement is necessary.

Linde v. U. S., 13 F. (2d) 59;

Marcante v. U. S., 49 F. (2d) 156;

Dahly v. U. S., 50 F. (2d) 37;

Pelz v. U. S., 54 F. (2d) 1001;

Asgill v. U. S., 60 F. (2d) 780.

No unlawful agreement is shown anywhere in the evidence between these defendants, and the date of the alleged unlawful agreement, as set out in the indictment, was on or about July 1, 1943. [R. 3.] Nowhere is such agreement shown to have been formed on or about that date, or at any time. For that reason Count I of the indictment was not established by any legal or competent evidence.

Counts II and III allege a transaction between the defendants and William Meuhlberger. Counts II and III specify general terms of the sale of beef and veal in excess of the Maximum Price. Meuhlberger testified that he purchased the meat from Southern California Meat Company No. 2. [R. 88-89.] He said he talked to Mr. Stillman [R. 90] and that he asked Mr. Stillman if he could get some meat, and all that he can recall is that Mr. Stillman said, "It will be five cents, over." [R. 93.] He has no knowledge of how much meat was delivered to him. [R. 101.] He subsequently got into an argument with Mr. Stillman. [R. 102-103.]

Viewing the nature of the transaction and the fact that he was the only witness, the evidence alone was certainly insufficient to establish violation of the statute.

See

Dahley v. U. S., 50 F. (2d) 37.

The court, prosecutor and jury apparently treated the transaction as one that would also bind Mr. Segal, although there is not one iota of testimony as to Mr. Segal. Mr. Segal was not present and it was not shown that he did in any way engage in the transaction.

A partner is not charged with the criminal acts of his co-partners or others acting in behalf of a firm unless he has knowledge thereof. Therefore, the mere fact that a partnership is business cannot be the basis of conviction even for conspiracy, let alone the substantive of offense.

U. S. v. Cohen, 128 Fed. 615, affirmed 145 Fed. 1, certiorari denied 200 U. S. 618, 50 L. Ed. 623.

What we have said here relates to most all of the transactions. Count Four relates to a transaction with the Clover Meat Company, and the witness Horace Greeley Weaver could not identify how much he paid for any particular meat at any time, nor how much he paid "over" the amount, in this transaction. Some transactions related only to Stillman, others to Segal only. The evidence as to each was indefinite and uncertain and therefore supported none of the counts.

Counts Four, Five and Six relate to an alleged transaction with the Clover Meat Company.

He said he paid for meat and gave him some additional cash. He did not know what amount. [R. 113.] He did not remember the price or from one purchase to another. [R. 114.] He did not remember on any invoice what he paid. [R. 116.]

This evidence is entirely insufficient to establish the charges herein. It only relates, furthermore, to his dealings with Lou Segal and nothing whatever was said regarding Hyman Stillman.

Counts Twelve, Thirteen, Thirty-two, Thirty-seven, Thirty-eight, Thirty-nine, Forty, Forty-one, Forty-two, Forty-three, Forty-four and Forty-five are "false entry" counts.

There is no evidence in the record that these defendants made these invoices or caused them to be made falsely, at the time of their making.

There is no proof of guilty knowledge.

The invoice was something that was given, apparently, to the customer as a bill. It is not shown, and there is nowhere in the evidence that it was shown, to be a document to be required to be kept under the provisions of the Emergency Price Control Act of 1942, or any regulation thereunder. This was assumed but not proved.

The other counts relate to sales to Dana and Roberts. These transactions also only were with Lou Segal and not with Hyman Stillman.

Leo Blank testified he did not know the amount he paid, but to his recollection it would be a penny a pound. He did not state how much he paid. [R. 183.]

Throughout the court's instructions the court gave instructions on the Emergency Price Control Act of 1942, as amended. This was error since the indictment did not charge a violation of the Emergency Price Control Act, as amended. [R. 327, 329.]

The defendants moved the court to direct the jury to enter judgments of acquittal because of the termination of the statute. The motion was denied. [R. 367 *et seq.*]

The statement of the court that the prices to which he referred were "fixed in accordance with the Emergency Price Control Act of 1942" is incorrect since no Price Regulation is here involved in this case or issued under the Emergency Price Control of 1942. It is only by reason of later amendments and regulations issued pursuant to those amendments.

The Court Erred in Connection With Instructions Given.

The court committed the following errors in the given instructions:

> "I now instruct you that under the Emergency Price Control Act of 1942, *as amended,* and the Maximum Price Regulations, Nos. 169, 148 and 239, the highest prices which could be charged for the various meat items involved in this case are, as to each count of the indictment concerned with a sale of meat, as I shall now read to you.
>
> Count 2: Grade A beef 21 cents a pound; Grade A veal 21¾ cents a pound;
>
> Count 3: Grade a beef 21 cents a pound;
>
> Count 4: Grade A beef 20¾ cents a pound;
>
> Count 5: Grade A beef 20¾ cents a pound;
>
> Count 6: Grade A beef 20¾ cents a pound;
>
> Count 12: Grade B beef 18¾ cents a pound;
>
> Count 13: Grade A beef 20¾ cents a pound;
>
> Count 45: Grade A beef $20.75 per hundred pounds or 20¾ cents a pound;
>
> Count 46: Grade A beef $20.75 per hundred pounds or 20¾ cents a pound;
>
> Count 47: Grade A veal $21.50 per hundred pounds or 21½ cents per pound; Grade B veal $19.50 per hundred pounds or 19½ cents per pound;
>
> Count 48: Grade A veal $21.50 per hundred pounds or 21½ cents a pound;
>
> Count 49: Grade A veal $21.50 per hundred pounds or 21½ cents a pound;
>
> Count 50: Grade B veal $19.50 per hundred pounds or 19½ cents a pound." [R. 362.]

It will be noted that the instruction relates to the Emergency Price Control Act of 1942, *as amended,* and the Maximum Price Regulations under such amended act. However, the indictment does not charge the Emergency Price Control Act of 1942 "as amended" and it would not be possible for the court to so instruct the jury as it was not within the terms of the indictment. If it were so possible, it would constitute in effect an amendment or change of the indictment itself, which this court has held could not be done.

Carney v. U. S., No. 11001, Ninth Circuit Court of Appeals;

Ex parte Bain, 121 U. S. 1;

Edgerton v. U. S., 143 F. (2d) 697.

The instruction also invaded the province of the jury as to the price for the type and kind of meat allegedly bought and sold.

The Court Erred in the Admission and Exclusion of Evidence.

The court erred in failing to strike the evidence of the invoices on the grounds that no proper foundation had been laid, to-wit: Title 28, Section 695, U. S. Codes; Title 28, Section 656. [R. 321, also R. 304, 305.]

At no time were the invoices which were offered shown to have been made in the regular course of any business or that it was the regular course of such business to make such memorandum or record at the time of such transaction, occurrence, or event, or within a reasonable time thereafter.

The possession of such invoice did not prove the transaction involved. None of the witnesses in question were able to testify to any of the transactions except from the purported invoices, for which no proper foundation was laid and the motion to strike should have been granted.

The court also erred in the admission and exclusion of the following other evidence in the case:

The court erred in the receipts of testimony of Samuel J. Phoebus, special agent of the Bureau of Internal Revenue [R. 292], and Government's Exhibit 38.

This was objected on the grounds that it violated the defendants' rights under the fourth and fifth amendments to the Constitution of the United States and on other grounds. [R. 293.]

The same objections were made to Government's Exhibit 39, consisting of the books and records of the Southern California Meat Company No. 2 [R. 297 to 299; 304, 305.]

The court erred in the admission of the testimony of Samuel J. Namson and admitting accounts of records which this accountant completely examined but did not audit. [R. 148, 139.]

The income tax return that Mr. Namson prepared was for Mr. Rosensweig, not for the defendant. [R. 152.]

The court erred in the admission of hearsay testimony of Mr. Weaver. [R. 131.]

As to the false entry count, there is no evidence that the defendants wilfully made any entries in their accounts or wilfully omitted any entries in their accounts.

Two instructions were offered along this line to the jury and both were refused: The defendants' proposed instruction No. 45, page 71 as follows:

> "You are instructed that certain courts charged the making or keeping of a false record.
>
> If you find from the evidence that the record honestly reflected what the defendant honestly believed to be correct, then you must acquit him of such counts."

And defendants' proposed instruction No. 47, page 72, as follows:

> "You are instructed that the faith of the defendants in their transactions is always a matter to be considered by the jury, and if the jury finds that the accused acted in good faith, even though mistaken, then you must acquit the accused."

Also, defendants' instruction No. 13, page 61, as follows:

> "You are instructed that a contrivance or device to evade provisions of an Office of Price Administration regulation may be unlawful; yet, if the defendant in good faith conscientiously believes that he was not violating the law in anything that he did or failed to do, as shown by the evidence, then he is not guilty of wilfully violating such regulation. This is true, notwithstanding that his act or omission may as a matter of law constitute an evasion of the provisions of a regulation."

The Court Erred in Refusing the Defendants a Bill of Particulars, as Demanded. [R. 28.]

This demand was in addition to the Motion to Dismiss for want of uncertainty. The indictment itself was in the language of conclusions of the pleader. It merely alleged prices in excess of the Maximum Price. It failed to set out the particulars.

The Motion to Dismiss should have been granted, but in the absence of granting that Motion the Motion to grant a Bill of Particulars should then have been granted.

U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588;
U. S. v. Hess, 124 U. S. 483, 31 L. Ed. 516;
Foster v. U. S., 253 Fed. 481;
Miller v. U. S., 288 Fed. 817;
Sixth Amendment, Constitution of the United States.

A defendant is entitled to particulars as to times, places, persons present and other data necessary to make his defense.

New Rules of Criminal Procedure, Rule 7, subdivision (f);
Glasser v. U. S., 315 U. S. 60, 86 L. Ed. 680.

The court erred in formula instructions as to prices. [R. 362.] These prices were a question of fact, based upon evidence. The government had put on an expert witness to determine these prices. It was not for the court to give these prices, such an instruction invaded the province of the jury.

The court erred in refusing defendants' proffered instruction on good faith.

The Emergency Price Control Act of 1942 makes good faith a defense.

The Government failed to prove that defendants acted with guilty knowledge or that they believed they were doing anything more than taking gifts or commercial bribes for preferences, and not any overceiling prices.

There was no evidence before the jury of any regulation which precluded the taking of a gratuity or in fact the terms of any regulation.

There was no evidence of the promulgation or publication in the Federal Register of any Regulation. Hence, the defendants were entitled to have the question of their good faith submitted to the jury from a requested instruction.

Motions for Judgment of Acquittal Should Have Been Granted.

Motions for judgment of acquittal at the close of the case should also have been granted on each of the grounds specified: Insufficiency of the evidence; the lack of authority in the Statute, and the invasion of the Constitutional rights of the defendants.

U. S. v. Hark, 320 U. S. 320, U. S. 531, 88 L. Ed. 290;

U. S. v. Chambers, 291 U. S. 217, 78 L. Ed. 736;

Sixth Amendment, Constitution of the United States;

Fifth Amendment, Constitution of the United States;

U. S. v. Cruickshank, 92 U. S. 542, 23 L. Ed. 588;

Counselman v. Hitchcock, 142 U. S. 547-586.

Motion in Arrest of Judgment Should Have Been Granted.

The defendants moved in arrest of judgment on each of the grounds set out hereinabove [R. 49-50], as follows:

"Motion in Arrest of Judgment

Come now the defendants Hyman Stillman and Lou Segal in the above-entitled case and move in arrest of judgment as follows:

I.

The indictment and each count thereof fails to state an offense against the laws of the United States.

II.

The indictment and each count thereof is vague, indefinite and uncertain, and violates the Sixth Amendment of the Constitution of the United States in that it fails to set forth facts which apprise the accused of the nature and cause of the offenses.

III.

The trial court erred in admitting into evidence income tax statements which were made by defendants under the compulsion of the law, and which were used against the defendants in violation of their Constitutional rights under the Fourth and Fifth Amendments of the Constitution of the United States.

IV.

The court erred in the admission of statements made by the defendants which were not freely and voluntarily made, but were made under the compulsion of the law to members of the Bureau of Internal Revenue, and the judgment based upon such statements was, therefore, based upon evidence ille-

gally secured, in violation of the defendants' rights under the Fifth Amendment to the Constitution of the United States, and particularly under its privileges and immunities and due process clauses.

V.

The court was and is without jurisdiction to pronounce judgment for the reason that the statute giving jurisdiction to the court to try defendants has expired.

VI.

The court is without jurisdiction to act in any O.P.A. matter because not only has the jurisdiction of the court ended with the termination of the Office of Price Administration statute, but all regulations thereunder have also ended and the particular provisions of the statute providing for jurisdiction of the District Courts of the United States have ended.

MORRIS LAVINE."

On the basis of the arguments heretofore presented and the cases heretofore cited, the motion in arrest of Judgment should have been granted.

Conclusion.

For each and all of these errors, appellants pray for a reversal of the Judgment with directions to dismiss the indictment.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellants.